90-922

NO.

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1990

ANDREW D. SCHOLBERG, et. al.,

Petitioners

v.

AARON S. LIFCHEZ, et. al.,

Respondents

PETITION OF APPELLANTS/PROPOSED INTERVENORS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1.) Whether *Roe v. Wade* must be overruled?

2.) Whether the privacy rights announced by this Court in *Roe v. Wade* must be expanded to include the right to sell human prenatal offspring up until the moment of birth for purposes of experimenting on them or for harvesting their body parts?

3.) Whether, in light of the protection of women's freedom from unwarranted state intrusions into their reproductive decisions under the Fourth and Fourteenth Amendments, the analysis of *Roe v. Wade* to protect these same interests is unnecessary?

4.) Whether *Webster v. Reproductive Health Services* has modified or overruled *Roe v. Wade* within the meaning of I.R.S. Chap. 38, P. 81-21, thereby making prenatal humans persons within the meaning of Illinois law?

5.) Whether *Dred Scott v. Sandford* must be overruled?

6.) Whether, in light of the Thirteenth Amendment, prenatal humans or their body parts or tissues may be sold as chattel property from the moment of conception to the moment of birth?

7.) Whether federal courts lack subject matter jurisdiction to limit or abolish state personhood for purposes of state law?

8.) Whether, in light of the case or controversy requirement, federal courts lack subject matter jurisdiction to enjoin a state statute in toto when only part of the statute has been challenged?

9.) Whether the decision in this case, and the precedents of the Seventh Circuit, that the Seventh Circuit will

ignore questions of its subject matter jurisdiction and proceed to judgment on the merits must be overruled?

10.) Whether the Court of Appeals erred in affirming the orders of the District Court?

11.) Whether the Illinois Fetal Experimentation Act is facially void for vagueness?

THE PARTIES

ANDREW D. SCHOLBERG, as Expectant Father and Next Friend of BABY SCHOLBERG, on behalf of BABY SCHOLBERG individually and as a proposed representative of a class of all unborn babies in the State of Illinois, presently conceived or to be conceived in the future,

Petitioners/Appellants,
Proposed Intervenors,

v.

AARON S. LIFCHEZ, on behalf of all physicians who presently specialize in reproductive endocrinology in the State of Illinois, on behalf of all physicians who perform genetic testing on pregnant women, and on behalf of all patients desiring these medical services,

Respondents/Appellees,
Plaintiffs,

and

NEIL F. HARTIGAN, Attorney General of the State of Illinois, in his official capacity, and JACK O'MALLEY, State's Attorney for the County of Cook, State of Illinois, in his official capacity and as a representative of the class of all State's Attorneys of the 102 counties of the State of Ilinois,

Respondents/Appellees,
Defendents.

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JURISDICTION OF THIS COURT

This case was originally filed as a class action suit pursuant to 42 U.S.C. Sect. 1983 and 28 U.S.C. Sects. 1343 and 1392(a). In 1986 the plaintiffs filed a facial void for vagueness challenge in a second amended complaint under 42 U.S.C. Sects. 1983 and 1988 and 28 U.S.C. 2201 and 2202. The date of entry of judgment in the District Court granting the plaintiffs' motion for summary judgment was April 26, 1990. A motion to intervene as of right for purposes of maintaining a class action and for purposes of taking an

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1.) The thirtieth day from the date of the order dated April 26 fell on Memorial Day weekend, and under Federal Rule of Appellate Procedure 26(a) we had until the next business day to file the appeal, which we did. *See, United Mine Workers, Intl. Union v. Dole,* 870 F.2d 662 (DC Cir. 1989); *Funbus Systems, Inc. v. California Public Utilities Com.,* 801 F.2d 1120 (9th Cir. 1986).

appeal was filed on May 22, 1990; this motion was denied on May 24, 1990. Both the judgment of April 26 and the denial of the motion on May 24 were appealed in this case. The notice of appeal was filed in the Seventh Circuit on May 29, 1990. The notice was timely.[1] The jurisdiction of the Court of Appeals was based on 28 U.S.C. 1291. The Seventh Circuit summarily affirmed the District Court on September 10, 1990. Certiorari is being sought under 28 U.S.C. 1254 (1) and 1254 (2).

2.) CONSTITUTION OF THE UNITED STATES OF AMERICA
FIFTH AMENDMENT (in pertinent part): No person shall be... deprived of life, liberty, or property, without due process of law... .

THIRTEENTH AMENDMENT (in pertinent part): Section One: Neither slavery no involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

FOURTEENTH AMENDMENT (in pertinent part): Section One: No State shall... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3.) I.R.S. CHAPTER 38 ¶ 81-21 §1: It is the intention of the General Assembly of the State of Illinois to reasonably regulate abortion in conformance with the decisions of the United States Supreme Court of January 22, 1973. Without in any way restricting the right of privacy of a woman or the right of a woman to an abortion under those decisions, the General Assembly of the State of Illinois do solemnly declare and find in reaffirmation of the long-standing policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State. Further, the General Assembly finds and declares that long-standing policy of this State to protect the right to life from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible only because of the decisions of the United States Supreme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution: Fifth, Thirteenth, and Fourteenth Amendments.[2]

Illinois Statutes: I.R.S. Chap. 38, ¶ 81-21, 81-26(7), and 81- 68.1 [3]

STATEMENT OF THE CASE

On April 26, 1990, the District Court for the Northern District of Illinois struck down the Illinois Fetal Experimentation Act, which prohibits the sale of prenatal human offspring [4] and which prohibits experimenting on them unless such experiment is therapeutic to the prenatal offspring.

(*Footnote 3 continued*) §2: It is the further intention of the General Assembly to assure and protect the woman's health and the integrity of the woman's decision whether or not to continue to bear a child, to protect the valid and compelling state interest in the infant and unborn child, to assure the integrity of marital and familial relations and the rights and interests of persons who participate in such relations, and to gather data for establishing criteria for medical decisions. The General Assembly finds as fact, upon hearings and public disclosures, that these rights and interests are not secure in the economic and social context in which abortion is presently performed.

I.R.S. CHAPTER 38 ¶ 81-26(7): No person shall sell or experiment upon a fetus produced by the fertilization of a human ovum by a human sperm unless such experimentation is therapeutic to the fetus thereby produced. Intentional violation of this section is a Class A misdemeanor. Nothing in this subsection (7) is intended to prohibit the performance of in vitro fertilization.

R.S. CHAPTER 38 ¶ 81-68.1: If any provision, word, phrase or clause of this Act or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the provisions, words, phrases, clauses or application of this Act which can be given effect without the invalid provisions, word, phrase, clause, or application, and to this end the provisions, words, phrases, and clauses of this Act are declared to be severable.

The plaintiffs were a class of physicians who perform services pertaining to reproductive medicine, including in vitro fertilization. The defendants were the Attorney General of the State of Illinois and the State's Attorney for Cook County in their official capacities. The State's Attorney for Cook County was named as a representative of a class of Illinois State's Attorneys for all of the counties in the State. Cross motions for summary judgment were filed.

In June of 1989 the District Court stayed further proceedings in the case to assess what action should be taken following the announcement of this Court's decision in *Webster v. Reproductive Health Services*, which came one month later. The reason is that Illinois provides by statute that if *Roe v. Wade* is ever overruled *or modified*, prenatal humans in the State of Illinois shall be deemed persons for purposes of State law. (Emphasis supplied.) *Webster* expressly modified *Roe*. Three status hearings were held following *Webster*. The attorneys for the State never brought to the attention of the District Court the fact that this statutory provision exists or that *Webster* had expressly modified *Roe*. At the second and third hearings they did not even show up.

The District Court denied the defendants' motion and granted the plaintiffs' motion, permanently enjoining enforcement of the statute. The District Court stated that the privacy rights announced in *Roe v. Wade* mandated the result which it reached.

The Court found the entire statute facially void for vagueness despite the fact that the Court itself makes reference throughout its opinion to various applications which would

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4.) The term prenatal human is used throughout in an attempt to describe the lives in question in a nonconclusory manner. "Fetus" has a dehumanizing connotation; "unborn child" connotes the conclusion of personhood. All will no doubt agree, however, that these entities which we are speaking of are prenatal and that they are human at least to the extent that they are the prenatal lives of the human race.

be constitutional, and despite the fact that no one at any time had challenged the sale provision of the statute. *Lifchez v. Hartigan*, 735 F.Supp. 1361, 1365-1370 (N.D. Ill. 1990). The statute has a severability clause.

The petitioners moved to intervene as of right under Federal Rule of Civil Procedure 24(a)(2) in the District Court for purposes of maintaining a class action and for purposes of taking an appeal when it became clear that the defendants would not appeal. The basis for taking the appeal was the need to preserve the deterrent effect of the private causes of action which can arise in Illinois under a criminal statute; it was not for the purpose of enforcing the criminal or civil provisions which the State can assert on its own behalf under a criminal statute, nor was it for the purpose of forcing the State to do so on its own.

The appeal was filed and the respondents moved to dismiss the appeal, alleging that this Court's holding in *Diamond v. Charles*, 476 U.S. 54 (1986), governs. The petitioners responded with a twenty-eight page memorandum. The Court then ordered another memorandum on the jurisdictional issues, and the petitioners filed an eighty-eight page memorandum. Then, before before briefing, the Seventh Circuit affirmed the District Court in toto in an unpublished opinion dated September 10, 1990.

SUMMARY OF ARGUMENTS

In 1973 Dr. Peter A.J. Adam announced that he had severed the heads of twelve aborted prenatal humans age twelve to twenty weeks of gestation and had kept them alive with fluids and a pump. He then performed experiments on them. In response to objections concerning the ethical implications of such practices he replied, "... once society has declared the fetus dead and abrogated its rights, I don't see an ethical problem."

If the order of the District Court is allowed to stand it will be legal for someone who wishes to experiment on prenatal human offspring to insist that they be Jewish babies only, as

the Nazis did at Auschwitz. If someone wants to be a broker for prenatal humans, their body parts, or their tissues, it will be legal for that person to insist that they be black babies only, as the slave owners did in the 1800's. If the order of the District Court is allowed to stand, racism, sexism, and every form of invidious discrimination will be fair game for anyone who is willing to restrict his activities to those members of humanity who are the most helpless.

The District Court strikes down the attempt by the people of the State of Illinois to protect prenatal human offspring. The Fifth Circuit has recently done the same thing. The prenatal humans of the State of Illinois, and of the several states, now lie openly exposed to such attacks. Only the certiorari review power of this Court stands in the way.

The District Court's expansion of the privacy rights announced in *Roe v. Wade* to now include the right to experiment on one's prenatal human offspring no matter what the consequences might be to such a child post-natally, and to now also include the right to sell one's prenatal offspring or the body parts thereof, illustrates the need to overrule *Roe v. Wade* expressly.

The District Court abandoned the case or controversy requirement for federal jurisdiction. The sale provision was never even challenged; and the statute has a severability clause.

The District Court's order abandons this Court's doctrines regarding a facial void for vagueness challenge and expands it to include statutes which have admittedly constitutional applications.

Federal courts lack subject matter jurisdiction to compromise state personhood for purposes of state law.

Prenatal human offspring in the State of Illinois are nonjoined indispensable parties to this case; the District Court had no personal jurisdiction over them.

The petitioners ask the Court to overrule *Roe v. Wade* and the *Dred Scott* decison of 1857. If the Court does not overrule *Roe* the petitioners ask that the Court either find that *Webster* has modified *Roe* to the extent that it makes the Illinois statutory provision for prenatal personhood operative, or that the Court so modify *Roe* now as to make that provision operative.

Federalism, an invasion of state sovereignty without subject matter jurisdiction, an abandonment of the case or controversy requirement for federal jurisdiction, an expansion of *Roe v. Wade* to allow the sale of prenatal humans offspring for purposes of experimenting on them or for harvesting their body parts are what this case is all about; these issues are inextricably linked.

Ultimately the petitioners seek dismissal of the case.

ARGUMENTS

I. THE DISTRICT COURT'S EXPANSION OF ROE V. WADE TO INCLUDE THE RIGHT TO SELL ONE'S PRENATAL OFFSPRING OR EXPERIMENT ON THEM ILLUSTRATES THE NEED TO OVERRULE ROE V. WADE EXPRESSLY.

The District Court found that its order was mandated by necessary expansion of the privacy rights of a woman under *Roe v. Wade*, 410 U.S. 113 (1973).[5] The right to privacy now includes the right to sell one's prenatal offspring for purposes of experimenting on them or for harvesting their various body parts. The right to control one's own body now becomes the right to sell one's offspring to have things done

5.) *See* 735 F.Supp. at 1376-1377.

to it outside of one's body; it then includes the right, after receiving payment for letting this be done to the child, to abandon the child after birth by leaving it with the state adoption agency. Not all women who allow such things to happen to their offspring will choose to abort once such a deed is done to a nine-month fetus, for childbirth at that point would be safer than abortion.

The sober warnings of the dissenting justices on January 22, 1973, seem mild compared to the harsh reality of what has happened between then and now.[6]

Sadly, we must note that the reasoning of the District Court correctly follows *Roe*. We therefore respectfully ask that *Roe* be overruled expressly.

A. In Light Of The Protection Of Women's Reproductive Decisions By The Fourth And Fourteenth Amendments, The Analysis Of Roe v. Wade To Protect These Interests Is Unnecessary.

An unwarranted state intrusion into a woman's reproductive decisions, such as a law forcing women to undergo abortions due to an overpopulation problem, would be unconstitutional even without *Roe*. As a concurring opinion said in *Cruzan v. Director, Missouri Dept. of Health,*

> "...Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause." [7]

And contrary to the reasoning employed by Solicitor General Fried at the oral argument of *Webster v. Reproductive Health Services*[8], the analysis used to protect this interest

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6.) 410 U.S. at 221-223.

7.) 110 S.Ct. at 2856 (O'Connor, J., concurring), (citing *Winston v. Lee*, 470 U.S. 753, 759 (1985) and *Schmerber v. California*, 384 U.S. 757, 772 (1966)).

8.) Tr. of Oral Arg., 109 S.Ct. 3040 (1989), # 88-605, at 21-22.

involves basic Fourth Amendment reasoning,[9] and requires no excursion into substantive due process.

II. THE ORDER OF THE DISTRICT COURT CONSTITUTES AN ABANDONMENT OF THE CASE OR CONTROVERSY REQUIREMENT BY ENJOINING IN TOTO A STATE STATUTE WHICH HAS BEEN CHALLENGED ONLY IN PART.

Eight years ago the Seventh Circuit went on record as saying that in considering a motion to intervene as of right it would ignore questions of its subject matter jurisdiction in proceeding to judgment.[10] Now it has done so again in this case. But the weight of authority stating that questions of subject matter jurisdiction are threshold questions which must always be addressed at any time, sua sponte if need be, is so overwhelming that these two cases in the Seventh Circuit may well be the only ones at any level of the federal court system which have ever said otherwise.[11]

The Emergency Court of Appeals has said that in any discussion of jurisdictional issues, the first and most impera-

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9.) *See*, note 7, *supra*.

10.) *U. S. v. South Bend Community School Corporation*, 692 F.2d 623, 628, n. 6 (7th Cir. 1982)

11.) *Bender v. Williamsport Area School Dist.*, 475 U.S. 534 (1986) (noting that this is of particular importance when a constitutional issue is presented), reh. den. 476 U.S. 1132; *In Re Rini*, 782 F.2d 603 (6th Cir. 1986); *In Re Miscott Corp.*, 848 F.2d 1190 (4th Cir. 1988); *In Re Martin-Trigona*, 763 F.2d 135 (2nd Cir. 1985); *U.S. v. State of Alabama*, 791 F.2d 1450 (11th Cir. 1986), reh. den. 796 F.2d 1478, cert. den. *Board of Trustees of Alabama State University v. Alabama State Board of Education*, 479 U.S. 1085; *Figueroa-Rodriquez v. Aquino*, 863 F.2d 1037 (1st Cir. 1988); *Minnesota Chippewa Tribe Red Lake Band v. U.S.* 768 F.2d 338 (Fed. Cir. 1985); *Emrich v. Touche Ross & Co.*, 846 F.2d 1190 (9th Cir. 1988); *Othman v. Globe Indem. Co.*, 759 F.2d 1458 (9th Cir. 1985); *Page v. Schweiker*, 786 F.2d 150 (3rd Cir. 1986); *Hahn v. U.S.*, 757 F.2d 581 (3rd Cir. 1985); *U.S. Dept. of Energy v. West Texas Marketing Corp.*, 763 F.2d 1411 (Em.App. 1985); *Federal Trade Com'n v. Owens-Corning Fiberglas Corp.*, 853 F.2d 458 (6th Cir. 1988), cert. den. *Roofing Corporation v. Owens-Corning Fiberglas Corporation*, 109 S.Ct. 1128.

tive question is that of the competency of the court over the subject matter. For if there is no jurisdiction over the subject matter, other considerations are immaterial.[12] We squarely addressed all of the issues pertaining to subject matter jurisdiction in an eighty-eight page memorandum and in a twenty-eight page memorandum. But the Seventh Circuit never addressed these issues in proceeding to judgment.

We submit that the federal courts lack subject matter jurisdiction to enjoin a statute in toto when only part of the statute is challenged, and that this is at least the case with respect to statutes which have a severability clause, as this statute does,[13] for in such cases there is no case or controversy with respect to the unchallenged provision.[14] At no point in the proceedings did the plaintiffs challenge the sale provision of the Fetal Experimentation Act. Thus, it was error for the Seventh Circuit to uphold the order of the Distict Court on this point.

In Illinois a severability clause leaves the remainder of the statute intact.[15] Significantly, all other cases which have held as unconstitutional various provisions of the Illinois Abortion Act (of which the Fetal Experimentation Act is a part) have struck down only that part of the statute which was challenged, and have left the remainder intact.[16]

12.) *U.S. Dept. of Energy v. West Texas Marketing Corp.*, 763 F. 2d 1411 (Em. App. 1985).

13.) I.R.S. Chap. 38, ¶ 81-68.1, *See* note 3, *supra*.

14.) *See, Diamond v. Charles*, 476 U.S. 54 (1986); *Allen v. Wright*, 468 U.S. 737, 750 (1984); *Valley Forge Christian College v. Americans United For Separation Of Church And State, Inc.*, 454 U.S. 464, 471-476 (1982); *Muskrat v. U.S.*, 219 U.S. 348 (1911); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

15.) *Commercial Nat. Bank of Chicago v. City of Chicago*, 432 N.E.2d 227, 89 Ill.2d 45 (1982); *City of Carbondale v. Van Natta*, 338 N.E.2d 19, 61 ILL.2D 483 (1975); *Livingston v. Ogilvie*, 250 N.E.2d 138, 43 Ill.2d 9 (1969) (valid and invalid parts can even be in the same sentence).

16.) *Ragsdale v. Turnock*, 841 F.2d 1358 (7th Cir. 1988); *Diamond v. Charles*, 749 F.2d 452 (7th Cir. 1984); *Charles v. Carey*, 627 F.2d 772 (7th Cir. 1980); *Wynn v. Scott*, 449 F.Supp. 1302 (N.D. Ill. 1978); *Wilczynski v. Goodman*, 73 Ill.App.3d 51, 391 N.E.2d 479 (1st Dist., 2nd Div. 1979).

III. THE ORDER OF THE DISTRICT COURT CONSTITUTES AN ABANDONMENT OF THIS COURT'S DOCTRINES OF FACIAL VOID FOR VAGUENESS CHALLENGES AND EXPANDS THE SCOPE OF SUCH CHALLENGES TO STATUTES WHICH HAVE ADMITTEDLY CONSTITUTIONAL APPLICATIONS.

In a facial void for vagueness challenge a negative must be established. The law in question will be upheld unless it is clear that under no set of facts can the law be constitutionally valid; and this Court has expressly noted that it has never recognized an overbreadth doctrine outside of a First Amendment context.[17]

Nothing in the record or in the opinion of the District Court establishes the negative required to sustain this challenge. The prohibition against the sale of prenatal humans is certainly not vague, and even the District Court makes reference all throughout is opinion to various applications of the law which clearly fall within its intended and permissible scope.[18]

Unfortunately, this case is not the only one in which an expressed desire of the people to prevent fetal experimentation has been struck down under a misapplication of this Court's void for vagueness doctrines. Recently the Fifth Circuit reached the same result in construing a Louisiana statute as the Seventh Circuit has done here,[19] though prior to that the District Court in Louisiana had reached the opposite result in a challenge to an earlier version of that statute.[20]

In *Margaret S. I* the District Court rejected the facial void for vagueness challenge because it understood the difference in medical practice between an "experiment" on the one

17.) *U.S. v. Salerno*, 481 U.S. 739, 745 (1987); *Schall v. Martin*, 467 U.S. 253, 269, n. 18 (1984); *New York v. Ferber*, 458 U.S. 747, 766-77 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973).

18.) *See espec.* 735 F.Supp. at 1365-1370.

19.) *Margaret S. v. Edwards*, 794 F.2d 994 (5th Cir. 1986). (*Margaret S.III*).

hand, in which new techniques are tried out for the sake of obtaining raw data, and a "test" on the other hand, such as taking a blood count or analyzing a urine sample for the purpose of diagnosing a patient and determining the best course of treatment.

The District Court in the case at bar rejected the reasoning of the District Court in *Margaret S. I*, as did the Fifth Circuit in *Margaret S. III*. The failure of the District Court in the case at bar, and the failure of the Fifth Circuit, to understand this basic, simple principle of medicine illustrates as clearly as any case does that the federal courts lack the competance to make themselves into bio-medical review boards. Lacking the expertise to understand even simple principles of science, the federal courts are fair game for anyone who wants to pull the wool over the courts' eyes and make them feel compelled to strike down state laws on the basis of imaginary flaws or a smokescreen of technically elaborate arguments.

IV. FEDERAL COURTS LACK SUBJECT MATTER JURISDICTION TO COMPROMISE STATE PERSONHOOD FOR PURPOSES OF STATE LAW.

This Court stated in *Dred Scott* that the states had reserved to themselves exclusively the right to establish personhood for purposes of state law.[21] The statement was made in dictum, but it was unquestioned at the time. Unfortunately it was not brought to this Court's attention at the time of *Roe v. Wade*. The unfortunate result is that this Court in *Roe* issued a ruling pertaining to prenatal natural personhood which it did not have subject matter jurisdiction to make.

The mere fact that this Court has exercised jurisdiction when it had none does not somehow render a similar attempt

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20.) *Margaret S. v. Edwards*, 488 F.Supp. 181 (E.D. La. 1980). (*Margaret S. I.*)

21.) 60 U.S. 393, 426 (1857)

at exercising such jurisdiction valid for later cases. As this Court has said,

> "Even as to our own judicial power or jurisdiction, this Court has followed the lead of Mr. Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silencio."[22]

Thus, although we ask this Court herein to overrule the analysis of *Dred Scott*, we also ask it to recognize that there was a statement made in dictum which expresses an accurate statement of the law both now and then with respect to the authority of the federal courts to compromise state personhood for purposes of state law.

The State of Illinois provides by statute that prenatal humans in the State are persons for purposes of State law.[23] The only qualification of such personhood is the holdings of this Court; the statute expressly provides that if *Roe v. Wade* is ever overruled *or modified*, legal personhood for prenatal humans in the State thereby takes effect. (emphasis supplied).

We submit that *Webster v. Reproductive Health Services* did modify *Roe* in a manner which now makes prenatal humans in the State of Illinois persons for purposes of State law.[24] If this Court concludes that *Webster* did not in fact do so, we ask this Court to so overrule or modify *Roe* now.

If the authority of the states to establish personhood for purposes of state law has been modified or abolished since *Dred Scott*, it would have to have been done by an amendment, specifically the Fourteenth Amendment. For as Publius pointed out, a sovereign right of the states can not be taken from them by implication.[25] Further, it has never been in doubt that the federal government is to be a government

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22.) *Nathanson v. Labor Board*, 344 U.S. 25, 38 (1952).
23.) *See* I.R.S. Chap 38, ¶ 81-21. (note 3, *supra*).
24.) 109 S.Ct. 3040, 3055-3058 (1989).

having only those limited powers which are specifically granted to it; for instance, Article Seven of the First Draft of the Constitution (August 6, 1787) differs very little from Article One, Section Eight of the Constitution as it was ratified and still exists today.

Are the respondents prepared to say that *Dred Scott* went too far to the extent that it *would* allow an individual the right to have his interests protected by the law? Are they prepared to say that *Dred Scott did not go far enough* in denying an individual standing to protect his interests? Such a submission, if it were made, would have to aver that this is accomplished by the Fourteenth Amendment; such a submission, if it were made, would be untenable on its face.

V. WE ARE NONJOINED INDISPENSABLE PARTIES TO THIS CASE.

The questions pertaining to one's status as an intervenor as of right and a nonjoined indispensable party are, analytically, much the same in most respects, and so we discuss them together.[26]

The interests of prenatal humans as persons in this case falls within the meaning of the type of interest which makes one a nonjoined indispensable party to a case.[27] The question then is whether prenatal humans are persons in contemplation of law or not; for if they are their interests as nonjoined indispensable parties can be recognized.

25.) "(An exercise of sovereignty by the Union not expressly delegated to it would be) an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of sovereignty...(and)...all authorities, of which the States are not explicitly divested in favor of the Union, remain with them in full vigor..." *The Federalist*, No. 32 (Hamilton); "...the States, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction." *The Federalist*, No. 40 (Madison); and see, *generally*, *The Federalist* No's. 41 (Madison), 44 (Madison), and 45 (Madison).

A. Prenatal Humans Are Persons Within The Meaning Of The United States Constitution.

1. Federal Personhood For Purposes Of Defending State Law Personhood Is Inherent In The Federal Nature Of The United States Constitution.

This Court in *Dred Scott* did not say just exactly how standing to defend one's state law personhood against a federal intrusion would arise. It would certainly arise at least under the Fifth Amendment. But the indefeasibility of state law personhood does not depend upon a grant of this right by the federal constitution to the states; rather, this Court noted that this is a sovereign right which the states reserved to themselves. (*See* note 21, *supra*.) Thus, standing to defend one's state law personhood against an intrusion by a federal court is inherent in the federal nature of the U.S. Constitution. It would have existed even prior to the adoption of the Fifth Amendment and the other provisions of the Bill of Rights on December 15, 1791.

2. Prenatal humans are persons within the meaning of the Thirteenth Amendment.

The Thirteenth Amendment does not use the word "person", but it does use the word "slavery".[28] And one of the definitions of the word slavery is the ownership of a human being as chattel property.[29]

26.) *New York State Association For Retarded Children, Inc. v. Carey*, 438 F. Supp. 440 (D.C. NY 1977); *Christy v. Hammel*, 87 F.R.D. 381 (D.C. PA 1980); *National Wildlife Federation v. Hodel*, 561 F. Supp. 473 (E.D. Ky. 1987).

27.) *California v. Arizona*, 440 U.S. 59 (1979); *Lumbermen's Mutual Casualty Co. v. Elbert, 348 U.S. 48 (1954); United Shoe Machinery Corp. v. U.S.*, 258 U.S. 451 (1922); *Niles-Bement Co. v. Iron Moulders Union*, 254 U.S. 77 (1920); *Swan Land and Cattle Co., v. Frank*, 148 U.S. 603 (1893); *Kendig v. Dean*, 97 U.S. (7 OTTO) 423 (1876); *Railroad Co. v. Orr*, 85 U.S. (18 WALL.) 471 (1873); *Ribon v. Railroad Companies*, 83 U.S. (16 WALL.) 446 (1872); *Shields v. Barrow*, 58 U.S. (17 HOW.) 130 (1854); *Mechanics Bank v. Seton*, 26 U.S. (1 PET.) 299 (1828); *Mallow v. Hinde*, 25 U.S. (12 WHEAT.) 193 (1827).

28.) *See* note 2, *supra*.

29.) Webster's Ninth New Collegiate Dictionary (1987).

The Thirteenth Amendment is implicated in two ways. First, one obviously unintended consequence of *Roe* is that prenatal humans now fit every legal definition of the word "property".[30]

Thus, under *Roe* human beings are once again deemed to be chattel property. Every pregnant woman in the United States is rendered a slave owner; she may keep or dispose of her prenatal offspring for any reason at all, or for no reason at all. The Thirteenth Amendment is effectively overruled by *Roe*.

Second, the fetal experimentation law found unconstitutional in this case prohibits one of the most patent badges and incidents of slavery: the sale of a human being.

Even if the court does not agree that prenatal humans are persons within the Thirteenth Amendment for all purposes, we submit that they are such persons to the extent that some use or sale of their body parts could affect them postnatally. As the plaintiffs/appellees noted earlier in this case, under Illinois tort law one may be a person prenatally for purposes of injuries sustained during that period if the effects continue postnatally.[31] We submit that to deny prenatal humans such a recognition of their rights with respect to the Thirteenth Amendment would cause the intended scope of that amendment to be diminished, something which can be done properly only through the constitutional amendment process.

Pregnancies today can be initiated for profit. The recent developments in the treatment of Parkinsonism and Alzheimer's Disease with brain cells from prenatal humans provide such a market by themselves. A mother can also sell various organs of her prenatal offspring for transplant into

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30.) Dukeminier and Krier, Property, 5 and 58 (1981). Black's Law Dictionary (5th ed.) ("property" and "property right"). 63A Am.Jur.2d Property sect. 1-3.

31.) Plaintiff's Memorandum in Support of Their Motion For Summary Judgment at 18, n.25; docket no. 146, filed Jan. 7 1988 (citing *Renslow v. Mennonite Hosp.*, 67 Ill.348, 367 N.E.2d 1250 (1977).)

another child, and then leave the child with the state adoption agency after birth.

A prenatal human in the ninth month of development can be the nonconsenting donor to a child born after eight months of gestation. One child would be a person, yet the other would not. This is not law; it is only madness disguised as law.[32] Dr. Hans O. Tiefel points out that the reason scientists are so eager to experiment on prenatal human life is that the fetus is life and a Homo sapien. "Fetuses are the last of the unemancipated," he says.[33]

In 1973 Dr. Peter A.J. Adam announced that he had severed the heads of twelve aborted prenatal humans age twelve to twenty weeks of gestation and had kept them alive with fluids and a pump in order to perform experiments on them pertaining to carbohydrate metabolism. In response to objections concerning the ethical implications of such practices he replied, "... once society has declared the fetus dead and abrogated its rights, I don't see an ethical problem."[34]

The order of the District Court in the instant case strikes down the attempt by the people of the State of Illinois to protect prenatal human offspring against such wholesale barbarism. The Fifth Circuit has recently done the same thing. The prenatal humans of the State of Illinois, and of the several states, now lie openly exposed to such attacks. Only the certiorari review power of this Court stands in the way.

These experiments were performed in Helsinki. *Roe v. Wade* removed whatever barriers stood in the way of doing such things here. But apparently our cultural objections to such things prevented most such practices from being performed here for the first ten years following *Roe*.

32.) *See*, Levine, *Help From the Unborn*, Time, Jan. 12, 1987 at 62. Gorman, *A Balancing Act of Life and Death*, Time, Feb. 1, 1988 at 49.

33.) Tiefel, *The Cost of Fetal Research: Ethical Considerations*, The New England Journal of Medicine, Jan. 8, 1976 at 86.

34.) Medical World News, *Post-abortion Study Stirs Storm*, June 8, 1973, p. 21.

For instance, in 1983 Dr. Alan Trouson and Prof. Carl Wood of the artificial human reproduction team at Melbourne's Queen Victoria Medical Center in Australia said they had received requests to grow human embryos to be harvested for spare parts and to have their brain cells used to treat Parkinson's disease and Alzheimer's disease. The two approved of this practice, but said that the one thing standing in their way was the fact that society was not ready for that yet.[35]

But by January, 1990, objections in the medical community of the United States to using fetal tissues for treating Parkinsonism or other diseases had largely disappeared, and an article appeared in the Journal of the American Medical Association outlining recommended guidelines to be followed in using such tissues. The article approved of the attempted use of fetal tissue which has taken place so far, and offered the proposed guidelines in order to encourage a more favorable climate for further developing such uses.[36]

3. Prenatal Humans Are Persons Within The Meaning Of The Fourteenth Amendment.

a. The Roe birth requirement is unsound in principle and unworkable in practice.

i. Roe v. Wade is on even more of a collision course with itself now than it ever was.

Contrary to what the dissent said in *Webster v. Reproductive Health Services, Roe v. Wade* is on even more of a collision course with itself today than it was when *Akron v. Akron Center for Reproductive Health* was decided. [37]

35.) Tucson Citizen, Dec. 14, 1983, Sect. A, at 7, col 1.

36.) Council on Scientific Affairs and Council on Ethical and Judicial Affairs, *Medical Applications of Fetal Tissue Transplantation*, Journal of the American Medical Association, 263(4): 565-70, Jan. 26, 1990.

37.) *See Webster*, 109 S. Ct. at 3075-3076, n. 9 (Blackmun, J., concurring in part and dissenting in part) (making reference to *Akron*, 462 at 459 (O'Connor, J., dissenting) (1983).).

Human embryo transfer is the prime example of this. Live births have already been reported from this technique. It involves taking an embryo during the first few days following conception from the womb of one woman and transferring the embryo to the womb of another woman. This is possible because during the first few days following conception the placenta, which attaches the prenatal offspring to the mother, has not yet formed. Once the placenta is formed, an embryo transfer can not be achieved.[38] The plaintiffs/appellees themselves made reference to this technique in the District Court.[39]

Does an embryo transfer constitute a live birth within the meaning of the Supreme Court's abortion decisions—more than mere momentary existence outside of the womb, albeit sustained with artificial aid—so that the prenatal life is a person with respect to the original mother? [40] And if that is so, is this life simultaneously not a person with respect to the second mother?

To this it might be objected that the "obvious" reason that this would not constitute a live birth within the meaning of the Court's decisions is the biological fact that the prenatal human still can not live outside of at least some person's womb. But this presents yet another interesting question.

If, as the Court made clear in *Roe*, the biological facts of prenatal development are irrelevant in a determination of prenatal personhood,[41] why would these facts then suddenly become relevant to deprive prenatal humans of their status as persons which they qualify for under the wording of the Court's own opinions?

38.) N.Y. Times, Jan. 8, 1984, sect. 6, at 42, col. 1.

39.) Plaintiffs' Memorandum in Support of Their Motion For Summary Judgment at 3-4, notes 4 and 6, and at 24-25. Docket No. 146; filed Jan. 7, 1988; Plaintiffs' Response In Opposition to Defendants' Motions for Summary Judgment at 18-19. Docket No. 150; filed Feb. 9, 1988.

40.) *See, Colautti v. Franklin*, 439 U.S. 379, 387 (1979).

41.) 410 U.S. 158-160.

To the Court in *Roe* personhood was strictly a legal fiction, completely divorced from the underlying biological facts of prenatal development. If on the one hand that is true, then with the rise of embryo transfer technology, such a transferred embryo now meets the Court's own criteria under a strictly legal fiction analysis for being entitled to the status of personhood, at least with respect to any rights asserted on its behalf against the original mother, if not with respect to the second mother.

If on the other hand we must find that the biological facts of prenatal development are indeed relevant to a determination of personhood, there is simply no reasonable basis for denying prenatal humans the status of personhood. And to say that the biological facts of prenatal development are not relevant to establish personhood, but that simultaneously they are relevant to take away such personhood under the wording of the Court's own opinions, suggests a double standard.

Embryo transfer puts yet another curious twist in *Roe*. The Court said that a state's interest in prenatal life becomes compelling at viability.[42] The Court has deemed viability to be a status which is based upon the underlying biological facts of prenatal development, and is not a legal fiction.[43] But what does this mean in light of the rise of embryo transfer technology? If, as a matter of medical practice, the early embryo is now able to live outside of the first mother's womb, albeit with artificial aid—the womb of the second mother, does this mean that the states have a compelling state interest at least with respect to the asserted rights of a mother during the first few days following conception in any pregnancy, before the placenta forms? For in such cases the embryo is "viable", at least according to the Court's statements concerning viability. And does the state's compelling interest depend on whether the mother has undergone, or will undergo, an embryo transfer procedure? Does the state then lose its compelling interest when the placenta

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42.) *Roe*, 410 U.S. at 163.

43.) *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 63-65 (1976).

is formed and the prenatal human attaches itself to a given womb?

The problems do not stop here. Embryo transfer between species has already been successfully achieved in lower animals.[44] The possibility exists that it may someday be applicable to humans.[45] The wombs of several animals are large enough to gestate a prenatal human.

Would a prenatal human in the womb of an animal be a person or not? Would the answer to this question vary with respect to whom its rights were being asserted against? The biological parents, for instance? The owner of the horse or cow it was being gestated in?

We are not yet near the point of achieving this breakthrough, but the mere fact that it is discussed in the literature at this time does serve to illustrate the point that the *Roe* birth requirement for determining personhood is incapable of adapting to changes in medical technology even if it once did have some validity at all.

Even as recently as this past May, the month after the District Court entered judgment in this case, a report was published in the New England Journal of Medicine stating in detail the success of a surgical team which repaired a serious, and what probably would have been an ultimately fatal, developmental defect in a prenatal human of age 24 1/2 weeks gestation. The child's abdominal contents had entered the sac designed to hold one of its lungs.

The physicians first anesthetized both the mother and the patient. They then drained and preserved the amniotic fluid. The arm of the child was withdrawn from the womb to enable the team to monitor the child's heart rate and rhythm with an EKG, and to monitor the oxygen saturation of the blood.

44.) *See*, Note, *Artificial Gestation: New Meaning for the Right to Terminate Pregnancy*, 21 Ariz.L.Rev. 755 (1979), and D. Kraemer, *Intra- and Inter-Specific Embryo Transfer*, Journal of Experimental Zoology, Nov. 1983, vol 228, at 363.

45.) *See*, Note, 21 Ariz.L.Rev. at 758-759, *supra*.

After surgery the amniotic fluid was replaced and the child was delivered by cesarean section at age 32 weeks gestation (i.e. just over seven months of gestational age). The report concluded by noting that at eight months of postnatal age the baby is "...at home, growing, and developing normally." [46]

Oddly enough, if the surgery had been only partially successful, the child might have to have been delivered even earlier than it was for further corrective surgery, and it would then have had all of the rights of personhood at an earlier stage of its development. But in cases in such as this, where the surgery is not a failure, and the child remains in utero, it is then subject to the whim of its mother and the attending physician about decisions to abort it, experiment on it, or sell its various body parts or tissues for a longer period of time. This illustrates as well as any case the fact that the current *Roe* birth requirement for the recognition of prenatal natural personhood lends new meaning to the term "legal fiction."

What will be the case when neonatal surgical techniques improve even more? What will be the case when an artificial placenta is developed? Surgical teams will be able to remove a prenatal patient from the womb entirely, severe the umbilical cord, and perform difficult procedures which would have been impossible for the team in the above article to do.

During the time that such a child is not in the womb, will it be a person or not? And will this vary with respect to whose rights its claims are being asserted against? If, after surgery, it is then placed back in the womb with a reconstructed or artificial placenta, will it then become a nonperson once more?

The *Roe* birth requirement for personhood is unworkable enough as things stand now. In the future it can only serve to create an even greater monstrosity in logic and an un-

46.) Harrison, *et. al.*, *Successful Repair In Utero of a Fetal Diaphragmatic Hernia After Removal of Herniated Viscera from the Left Thorax*, The New England Journal of Medicine, May 31, 1990, vol. 322, No. 22, 1582-1584.

workable basis for adjudicating the rights of all parties in the eyes of the law. The *Roe* birth requirement must be abandoned.[47]

b. Prenatal humans are entitled to a presumption of natural personhood.

The principle issue in *Dred Scott* was standing. This Court said that in order to have standing one not only had to show that one was a person, but also that one fell within an exlcusive class of persons who alone could also qualify as citizens. This Court even went so far as to say that the white race owed no obligation to uphold or protect the rights of slaves of African descent; but this was an incorrect statement of the law at that time even according to the law of the slave states themselves.[48]

The Fourteenth Amendment changed the requirement of standing from citizenship to personhood. But not only that, the determination as to who a person is was intended to be a simple one-tier analysis instead of the two-tier analysis of citizenship in *Dred Scott.* [49] The simple fact of personhood alone would establish the foundational, threshold basis for standing in any analysis of the issue of standing under the

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47.) For a contemporary comment on the need for a recognition of the personhood of prenatal human offspring, see, Hentoff, *Legal Status Could Guard Unborn From Neglect,* Human Events, Sept. 1, 1990 at 14.

48.) *State v. Jones,* 2 Miss. (1 Walker) 39 (1820).

49.) The sponsor of the Fourteenth Amendment in the U.S. House of Representatives, John A. Bingham, said that the amendment was "universal" and that it applied to "any human being." Cong. Globe, 39th Cong., 1st Sess. 1089 (1866). His counterpart in the Senate, Jacob Howard, said the amendment applies to "the humblest, the poorest, the most despised." Cong. Globe, 39th Cong., 1st Sess. 2766. And, as U.S. Senator Allen A. Thurman of Ohio would say a short time later, in 1875, the Equal Protection Clause, "...covers every human being within the jurisdiction of a State. It was intended to shield the foreigner, to shield the wayfarer, to shield the Indian, the Chinaman, every human being within the jurisdiction of a State from any deprivation of an equal protection of the laws." 3 Cong. Rec. 1794.

Fourteenth Amendment. This Court erred in *Roe* in failing to recognize this when it employed the *Dred Scott* analysis in determining prenatal personhood.

The Thirteenth and Fourteenth Amendments overruled the *result* of *Dred Scott*; but this Court has never overruled the *analysis* of *Dred Scott*. We ask this Court to do so now.

B. The Ethical Obligations Of The Legal Profession Will Prevent A State Attorney General From Ever Making The Arguments On Behalf Of Prenatal Natural Personhood Which We Make Here.

An attorney representing a state will always have an ethical obligation to his client, the state, to refrain from making the type of arguments in support of prenatal natural personhood which we make here. *Webster v. Reproductive Health Services* was a perfect example of this. The statute challenged therein defined personhood for all purposes as beginning at conception, subject only to the limitations placed on such status by this Court.

The most significant ethical barrier which appellant Webster faced, or which counsel for Texas and Georgia faced in *Roe* and the companion case *Doe v. Bolton,* [50] or which any future attorney general could face, is that a recognition of prenatal natural personhood within the meaning of the United States Constitution in one case can be used eventually against that attorney's client, the state, in a subsequent case. This was recognized by this Court in footnote 54 of its opinion in *Roe*. Thus, an attorney general will always be under an obligation to at least try to win a case without seeking a recognition of federal natural personhood. We submit that this ethical obligation alone would suffice to establish the inadequacy of the representation of prenatal humans by an attorney for a state.

Further, the defendants didn't even bother to show up for the last two of the three status hearings held by the District

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50.) 410 U.S. 179 (1973),

Court after *Webster*, despite the express statutory provision of Illinois law which makes prenatal humans persons in the State of Illinois if *Roe* is ever modified, and despite the fact that the District Court expressly stayed the proceedings in this case pending this Court's decision in *Webster v. Reproductive Health Services*, and further despite the fact that *Webster* expressly modified *Roe* in part. In the one hearing which they did attend they made no reference to the statutory provision which makes prenatal humans in the State of Illinois persons if *Roe* is ever modified, nor did they even mention that *Roe* had been modified.[51] (*See* Appendixes J, L, and N.)

C. The Rights Of Prenatal Humans In This Case Must Be Recognized.

Prenatal human offspring in the State of Illinois are nonjoined indispensable parties to this case. (*See,* note 27, *supra.*) Under *Provident Tradesmen's Bank and Trust Co. v. Patterson* and *Hoe v. Wilson*, this Court has recognized that appellate courts (including this Court itself) must act, sua sponte if need be, to protect the interests of nonjoined indispensable parties.[52]

VI. THIS CASE IS DISTINGUISHABLE FROM DIAMOND V. CHARLES.

We take no issue with this Court's holding in *Diamond v. Charles*, 476 U.S. 54 (1986). That case was properly decided. But this case is distinguishable from *Diamond* because Baby Scholberg sought to intervene to protect the private causes of action which one has in Illinois for a violation of a criminal statute. We do not seek to enforce either the criminal or civil actions which the State of Illinois itself could assert on its

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51.) *See, Weisman v. Darneille,* 89 F.R.D. 47 (D.C.N.Y. 1980) (decision of a party to discontinue status as a named plaintiff sufficed to establish that the proposed intervenor's interest was not adequately represented by that party).

52.) *Provident Tradesmen's Bank and Turst Co. v. Patterson,* 390 U.S. 102 (1968); *Hoe v. Wilson*, 76 U.S. (9 WALL.) 501 (1869).

own behalf under the statute, nor do we seek to force the State to do so itself.

The significance of this is that a right to maintain private causes of action under a criminal statute has a palpable and direct deterrent effect. This is a present, concrete benefit to be gained by prevailing in this Court on the merits.

A violation of a statute in Illinois may give rise to a private cause of action. There are two things which one must prove for this rule to apply. First, one must show that the injury suffered is the type of injury which the statute was designed to protect against.[53] Second, one must show that the person injured falls within the class of persons intended to be protected by the statute.[54] Indeed, everyone who is intended to be protected by the statute is entitled to damages for injuries caused by a violation of the statute.[55]

Dr. Diamond would not have been able to satisfy either requirement in any subsequent case if he had prevailed in this Court. Under virtually any subsequent violation of this statute, by contrast, prenatal humans in the State of Illinois would be able to satisfy both requirements. As to the type of injury, that much is obvious. As to the class of persons intended to be protected, Illinois provides by statute that prenatal humans are persons for purposes of state law.[56] They obviously are intended to be protected by the Fetal Experimentation Act. *See also* Section Two of ¶ 81-21, which states that the Illinois Abortion Act is intended to protect, *inter alia*, the rights and interests persons who participate in familial relations.[57]

We do not wish to be sold or experimented on. If a law had been passed prohibiting selling blacks or experimenting on

53.) *Ney v. Yellow Cab*, 2 Ill.2d 74, 117 N.E. 2d 74 (1954).

54.) *Brunnworth v. Kernes-Donnewald Coal Co.*, 260 Ill. 202, 216-17, 103 N.E. 178, 184 (1913). *Compare, Gibson, v. Leonard*, 143 Ill. 182, 32 N.E. 182 (1892).

55.) *Ross v. Shooley*, 257 F. 290 (1919); cert. den. 249 U.S. 615.

56.) *See* note 3, *supra*.

57.) Id.

Jews, and a federal court had struck down the law as being unconstitutional, would not blacks and Jews have a direct interest in the wrongful striking down of that statute? [58]

If the order of the District Court is allowed to stand it will be legal for someone who wishes to experiment on prenatal humans to insist that they be Jewish babies only, as the Nazis did at Auschwitz. If someone wants to be a broker for prenatal humans, their body parts, or their tissues, it will be legal for that person to insist that they be black babies only, as the slave owners did during the 1800's. If the order of the District Court is allowed to stand, racism, sexism, and every form of invidious discrimination which society has witnessed will be fair game for anyone who is willing to restrict his activities to those members of humanity who are the most helpless.

If there is anything else that distinguishes this case from Diamond and the other cases cited by the Seventh Circuit it is this: In Diamond and the other cases those who lacked standing were affected only by a state's attorney's decision not to prosecute under, or otherwise uphold and defend, a criminal law. Here, by contrast, we have been injured by a federal court's own unlawful action---striking down a statute which we would have private causes of action under even though the Court lacked subject matter or personal jurisdiction. In those other cases it was the governments' attorneys who had caused the alleged injury; here it is the federal court itself which has harmed us. In those other cases those who were denied standing had tried to use the federal courts to

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58.) *See, Larson v. Valente*, 456 U.S. 228 (1982) (Recognizing standing by a nonprofit organization to challenge a statute requiring the registration of certain religious organizations, even though the nonprofit organization might ultimately be found to be a nonreligious organization, and thus not governed by the statute.); *see also, Baker v. Carr*, 369 U.S. 186 (1962) (Interest in a fraction of a vote in a future election was sufficient to establish standing to challenge legislature apportionment.); *Data Processing Services v. Comp.*, 397 U.S. 150 (1970) (standing recognized for those who were arguably within the class of persons to be protected); *Barlow v. Collins*, 397 U.S. 159 (1970).

force a state to allow private citizens to take on the functions of a state; here, by contrast, we are not asking for something from the federal courts. We ask instead that an exercise of federal judicial power without subject matter jurisdiction be overruled so that we may enjoy the present deterrent effect of our own private causes of action. We seek no order requiring any State officer to do anything, nor do we wish to take upon ourselves any such functions and authority of the State.

Thus, though it is true that "the power to create and enforce a legal code, both civil and criminal, is one of the quintessential functions of a State"[59], yet it remains true simultaneously that a federal court must have jurisdiction to hear a challenge to the statute. And though a private citizen does not have the kind of direct stake in defending the standards embodied in a statute by which the State itself could impose criminal or civil sanctions *for the sake of the State's own interests,* yet where the State provides for a private cause of action under such a statute, a private citizen whose right to enjoy the protection of those causes of action has a direct stake in preventing an unlawful exercise of jurisdiction by a federal court which would keep the private citizen from enjoying the deterrent effect of the private causes of action. (*See* note 58, *supra.*)

The Seventh Circuit reasoned that the decision of the District Court must stand because the defendants, whom the Seventh Circuit deemed to be the only persons with standing, declined to challenge the District Court's order. But the Seventh Circuit seems to have forgotten one thing: Federal subject matter jurisdiction does not, can not, arise by consent; the mere fact that the parties whom the court does recognize have decided not to address a particular point of subject matter jurisdiction does not, by that mere act or failure of the parties themselves, confer jurisdiction on the court. With the case squarely before it, the Court of Appeals should have made an inquiry into the jurisdictional defects

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59). *Diamond*, 476 U.S. at 65.

raised in the submited memos; but the Court made no such inquiries. [60]

VII. THIS CASE WILL BE DISPOSED OF EASILY.

Once the issue of prenatal personhood is resolved, the facial void for vagueness challenge will be easy to rule on. The one clear conclusion which this court will face at the end of this case will be to remand it to the District Court with instructions to dismiss the case.

A. This Case Will Not Be Rendered Moot By The Birth Of Baby Scholberg.

The proposed intervenor, Andrew D. Scholberg, has sought not simply the protection of the specific person Baby Scholberg, but also prenatal humans to be conceived in the future in the State of Illinois; these would include any future prenatal offspring of his own. By the time *Roe v. Wade* reached this Court, Jane Roe (i.e. Norma McCorvey) had already given birth to her daughter. But this Court held that the possibility of future pregnancies kept the case alive, saying,

> "...Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition, yet evading review.' " [61]

Further, the Court can take a motion to dismiss for mootness under advisement until it determines whether prenatal humans are persons or not. If this Court deter-

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60.) *See, Bender, Page, Hahn, Emrich, In Re Martin-Trigona, In Re Miscott Corp., Minnesota Chippewa Tribe Red Lake Band, Figueroa-Rodriguez, U. S. v. State of Alabama, FTC v. Owens-Corning Fiberglas, Othman, and In Re Rini* (note 11, *supra.*) *See also, National Metalcrafters v. McNeil,* 103 F.R.D. 536 (D.C. Ill. 1984) (questions of jurisdictional defects may be raised by a party who intervenes.). *See also,* Dobbs, *The Decline of Jurisdiction by Consent,* 40 N.C.L.Rev. 49 (1961); and Moore, *Collateral Attack on Subject Matter Jurisdiction,* 66 Cornell L.Rev. 534 (1981)

61.) *Roe v. Wade,* 410 U.S. 113, 125 (1973).

mines that they are persons and also nonjoined indispensable parties, then under the Court's own doctrines of *Provident Tradesmen's Bank* and *Hoe v. Wilson* (*see*, note 52, *supra*) and under Federal Rule of Civil Procedure 19(b), the case will have to be dismissed for nonjoinder of indispensable parties, the prenatal humans in the State of Illinois. This is more procedurally sound than what happened in *Roe* itself.

A member of this Court recognized at the oral argument of *Roe* that the Court could take judicial notice of the fact that there are, at any given moment, pregnant unmarried women in the State of Texas, and counsel for Texas agreed with this.[62]

With respect to this case, then, the Court could take notice that there are at any given moment prenatal humans in the State of Illinois, and then determine whether they are nonjoined indispensable parties or not. We ask the Court to take such notice.

CONCLUSION

Wherefore, the petitioners respectfully ask this Court to grant the Petition for Certiorari.

Respectfully submitted,
Lawrence J. Joyce
Counsel of Record for the Petitioners.

62.) Tr. of Oral Arg. in *Roe v. Wade*, #70-18, at 31.